82-686

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OCT 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

A.V. COSTANTINI,
dba UNITED TRAVEL SERVICE,
dba WARDS TRAVEL SERVICE,

Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
DOES I THROUGH XC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

A.V. COSTANTINI
565 John Daly Blvd.
Daly City, Ca 94015
(415) 991-4907

In Propria Persona

QUESTIONS PRESENTED

1. Whether the court in dismissing the action viewed the material facts in the light most favorable to the party opposing a motion to dismiss.

2. Whether the existence of fraudulent concealment precludes the application of the doctrine of res judicata.

3. Whether the party moving to dismiss an action, and the court, are required to abide by the Rules of the Court requiring affidavits or declarations to support factual representations.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No._____

A.V. COSTANTINI, etc.

Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
DOES I through XC,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

A.V. Costantini, plaintiff and petitioner in the proceedings below, repectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

1. Order of the United States Court of Appeals for the Ninth Circuit dated July 22, 1982 affirming the judgment of the United States District Court for the Northern District of California dismissing plaintiff's complaint as barred by res judicata. (Appendix at A1) (not officially reported)

2. Order of the United States District Court for the Northern District of California dismissing plaintiff's complaint as barred under the doctrine of res judicata. (Appendix at B1) (not officially reported)

JURISDICTION

The judgment of the court of Appeals was entered on July 22, 1982 (Appendix at A1).

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED (RULES OF COURT)

United States District Court of the Northern District of California Local Rules 220-2 and 220-8.

STATEMENT

A. The Facts

A.V. Costantini ("Dr. Costantini") entered into the travel agency business in 1963 and during the ensuing decade opened branch offices in a number of the shopping centers located in the San Francisco Bay Area. In order to be able to issue interstate and international airline tickets, each newly opened travel office required separate approval by the Air Transport Association of America (ATC) and the International Air Transport Association (IATA). Each newly opened office required the employment of an experienced manager and certification that the ownership of the branch office was the same as that of the home office.

In 1972, Dr. Costantini began a nationwide expansion into the 475 Montgomery Ward stores by establishing travel offices under the name of Wards Travel

Service. The first Wards Travel Service office was opened and secured approvals from ATC and IATA. In March 1973, a second Ward branch office was opened, and shortly thereafter a third. ATC refused to approve these offices claiming that the managers lacked experience but ATC's reasons were overshadowed by its simultaneous written representation that the airline industry was being placed in a position of serious jeopardy as a result of Dr. Costantini's plan for establishing travel agencies in the Montgomery Ward stores. IATA failed to advise appellant as to any reason it was employing in its failure to approve these offices. ATC and IATA are mandated to provide applicants with all reasons for not approving a branch office pursuant to the provisions of Civil Aeronautics Board Orders No. E-14012, June 10, 1969 and No E-16459, dated March 1, 1961; such that the appli-

cant may correct deficiencies in order to be approved.

The conflict was aggravated on March 27, 1973, when a TWA representative informed one of Dr. Costantini's branch office managers that ATC was never going to approve any of the pending branch offices and that the manager should sever his relationship with Dr. Costantini and seek employment elsewhere.

On April 18, 1973, Dr Costantini, in his capacity as an appointed TWA agent, wrote to his principal, TWA, demanding that TWA provide any information it had in its possession upon which TWA knew that ATC would never approve the newly opened offices. TWA's response was that Dr. Costantini was charged with selling illegal airline tickets and that the office managers lacked experience. ATC and IATA had not given Dr. Costantini notice that the reason they were not ap-

proving the newly opened offices was that he was charged with selling illegal airline tickets. Dr. Costantini has never sold illegal tickets nor has he ever been charged of doing so. And, if the newly opened offices lacked experienced managers at the time they were being inspected by ATC and IATA, it was due to TWA causing these managers to quit working due to the fear created by TWA that they were engaged in the sale of illegal airline tickets.

As TWA's agent in the fiduciary relationship which existed between TWA and Dr. Costantini, Dr. Costantini relied upon TWA's representation that all of the information in its possession had been turned over to him. There was no rational reason to suspect that TWA, as Dr. Costantini's principal, would falsify its representations being made to him. Even if

suspicion were to have existed, it would have been dispelled by the fact that discovery procedures (ATC and TWA induced Dr. Costantini to dismiss his initial action against them [C 74 0365 SAW] by indicating that Dr. Costantini would be provided discovery as part of an attempt to resolve the controversy through an arbitrational tribunal), failed to elicit the key documents upon which the present action is based. It was represented that ATC provide Dr. Costantini with all of the documents in their possession relative to why ATC was not approving the branch offices being located in the Montgomery Ward Stores. Dr. Costantini's attorney traveled to ATC's offices in Washington, D.C. where he deposed ATC officers and employees and obtained "all" of the documents ATC represented that it had in its possession. The key documents upon which this action is based were <u>not</u> among

those documents. The document surfaced when the Civil Aeronautics Board's investigators made an unannounced investigatory visit to ATC offices and proceeded to copy the entire United Travel Service files maintained by ATC. It was only when Dr. Costantini exercised his rights under the Freedom of Information Act that the very existence of the secretive and false communication from TWA to ATC was first learned. What TWA, and ATC, had failed to disclose to Dr. Costantini and his attorney was that TWA had written to the Civil Aeronautics Board and to ATC that Dr. Costantini was not the true owner of his branch offices and that these offices were owned by the branch manager:

> "the fact that he has been requesting approval of his agency locations as branches..but is reported to be selling the branches as franchises and a a percentage of the profits."

Dr. Costantini has never sold his branches as franchises and the ownership of his branches was at all times the same as that of the parent office.

As a result of TWA's falsifications before the Civil Aeronautics Board, that Board terminated its investigation of TWA relative to the conflict.

As a result of TWA's false representations to ATC, Dr. Costantini was effectively prevented from expanding into the 475 Montgomery Ward Stores nationwide.

As a result of TWA's fraudulent concealment of the lies it was secretively spreading regarding Dr. Costantini was unable to prevail in prior litigation.

The fact that TWA and Dr. Costantini were in direct competition with each other in the sale of air transportation and related services cannot be overlooked.

If Dr. Costantini had not exercised

his right under the Freedom of Information Act, none of the above fraud would have been discovered.

B. Proceedings Below

Following the discovery of the existence of fraudulently concealed documents indicating that TWA had made false statements resulting in the loss of the Montgomery Ward License Agreement, Dr. Costantini filed the instant complaint alleging unfair interference by TWA with Dr. Costantini's business relationship with ATC and IATA. The original complaint was filed on February 8, 1980 and amended, as a matter of course,on February 25,1980; the amended complaint setting forth all of the necessary facts required to demonstrate to the court that TWA had fraudulently concealed the material facts upon which the complaint was based.

On April 16, 1980, the district court granted TWA' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the action was barred by the doctrine of res judicata. TWA's motion was not accompanied by affidavits or declarations as are required by the rules of the court. (Appendix at B1)

Dr. Costantini filed his notice of appeal on May 13, 1980 in the United States Court of Appeals for the Ninth Circuit.

On July 22, 1982, the Court of Appeals for the Ninth Circuit affirmed the district court's judgment dismissing Dr. Costantini's complaint as barred by res judicata. (Appendix at A1)

REASONS FOR GRANTING WRIT

I. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE ADICKES CASE, AND OTHER CASES IN THIS COURT, THAT MATERIAL FACTS MUST BE VIEWED IN THE LIGHT MOST FAVORABLE TO THE OPPOSING PARTY

The material fact in this case is that Trans World Airlines, Inc., as the principal in the fiduciary relationship existing with its agent, A.V. Costantini, falsified the representations which were made to A.V. Costantini. The key evidence was concealed during earlier discovery procedures and was only recently discovered when non-public investigatory files of the Civil Aeronautics Board were obtained pursuant to palintiff's Freedom of Information Requests.

As the moving party, Trans World Airlines, Inc. had the burden of showing the absence of a genuine issue as to the material facts and when it failed to do so, the court erred in dismissing the

complaint. The materials lodged must be viewed in the light most favorable to the party opposing the motion to dismiss. Adickes v Kress & Co., 398 U.S. 144, 157.

The only burden shouldered by the party opposing summary judgment is to adduce specific facts which present an issue worthy of trial to resolve the parties differing versions of the truth. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-289.

II. THE DECISION BELOW CONFLICTS WITH THE PRINCIPAL SET OUT IN THE MAGEE CASE, AND OTHER CASES IN THIS COURT, THAT FRAUDULENT CONCEALMENT OCCURS WHEN A PARTY SUPPRESSES SOMETHING WHICH IT IS BOUND TO DISCLOSE

The proceedings below ignored the fact that a fiduciary relationship existed between Trans World Airlines, Inc., and A.V. Costantini. As Trans World Airlines' agent, A.V. Costantini relied upon his principal's representation that all of

the facts had been provided to him. The truth of the matter, as A.V. Costantini recently learned through his Freedom of Information Request of confidential Civil Aeronautics Board records, is that Trans World Airlines wilfully and intentionally concealed material facts in its possession which were not only injurious to him but would have resulted in a judgment in his favor during the prior litigation. This Court has addressed this issue on at least three prior occasions:

> a concealment must, in order to be fraudulent, be wilful and intentional and a suppression of something which the party is bound to disclose, Magee v. Manhatten Life Insurance Co. 92 U.S. 93;
>
> the suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false

representation, Tyler v. Savage, 143 U.S. 79;

fraud, in the sense of a court od equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another, Securities & Exchange Com. v. Capital Gains Research Bureau, Inc., 375 U.S. 180.

III. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLE SET OUT IN THE RIO GRANDE CASE THAT A DULY AUTHORIZED RULE OF THE COURT IS BINDING UPON THE COURT AND THE PARTIES.

In the proceeding below, the court did not abide by its own rules requiring Trans World Airlines to submit affidavits or declarations in support of the factual representations made in its motion to

dismiss A.V. Costantini's complaint.

Local Rule 220-2 of the United States District Court of the Northern District of California, then in effect, is clear:

"Each notice of motion shall be accompanied by affidavits or declarations under penalty of perjury.."

Local Rule 220-8 of the same court, then in effect, mandates:

"Factual contentions made in support of any motion shall be supported by affidavits or declarations."

The notice of motion and motion to dismiss of Trans World Airlines, Inc., were unsupported by the required affidavits or declarations. Most of the factual representations made by Trans World Airlines were simply false and could not be supported by affidavit or declaration without Trans World Airlines incurring the penalties of perjury. The

rational for the existence of rules of the court requiring affidavits and declarations is to insure that the court is presented truth and not the type of false statements made by Trans World Airlines, Inc.'s counsel in obtaining judgment in favor of his client at the expense of the plaintiff in this case. Truth is the only basis upon which final judgments shoud be based.

A duly authorized rule of the court has the force of law, and is binding upon the court as well as upon the parties to an action, and cannot be dispensed with the particular circumstanses of any particular case. Rio Grande Irrigation and Colonization Co. v. Gildersleeve, 174 U.S. 603. In this case, the Local Rules of the Court mandates that notice of motion and motions shall be accompanied by affidavits or declarations. The word

"shall" is ordinarily the language of command; and when a Federal Rule of Civil Procedure uses both "may" and "shall" the normal inference is that each term is used in its usual sense-the one act being permissive, the other mandatory. Anderson v. Yungkau, 329 U.S. 482.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

A.V. Costantini
In Propria Persona
565 John Daly Blvd
Daly City, Ca 94015
(415) 991-4907

October 18, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

A.V. COSTANTINI, Plaintiff-Appellant, vs. TRANS WORLD AIRLINES and DOES I through XC, Defendants-Appellee.	No. 80-4239 OPINION

Appeal from the United States District Court for the District of Northern California William W Schwarzer, District Judge, Presiding Argued and Submitted October 15, 1981

Before: WALLACE and PREGERSON, Circuit Judges, and BYRNE*, District Judge.

PREGERSON, Circuit Judge:

---

*The Honorable William Matthew Byrne, Jr., United States District Judge, Central District of California, sitting by designation.

Appellant Costantini appeals from the district court's judgment dismissing his complaint as barred by res judicata. Because we agree that res judicata bars the instant lawsuit, we affirm.

Appellant operates a travel agency business in the San Francisco bay area. In 1972, he entered into a license agreement with Montgomeray Ward & Co. ["Ward"] that permitted him to open branch offices in Ward stores nationwide. He opened one such branch office in June 1972 and secured approvals from the Air Traffic Conference of America ["ATC"], a division of the Air Transport Association of America ["ATA"], and from the International Air Transport Association ["IATA"]. These approvals are a prerequisite for a branch office to issue interstate and international airline tickets.

In March 1973, appellant opened a second Ward branch office, and shortly

thereafter a third. ATC and IATA refused to approve these offices. In April 1973, Ward informed appellant that it would not allow him to open more Ward branches until he could secure ATC and IATA approval. In April 1974, Ward cancelled the license agreement altogether, effective June 15, 1974.

In February 1974, appellant and his wife filed suit in the United States District Court for the Northern District of California against numerous defendants,including TWA as well as other airlines and ATA. The complaint was dismissed without prejudice, pursuant to a stipulation of the parties, in September 1974.

In October 1975, appellant and his wife filed a new complaint against ATA, ATC, TWA, and various other airlines. This complaint ["the 1975 complaint"] stated several federal counts and some

pendent state claims.[1] The district court dismissed the 1975 complaint in July 1977 and entered judgment against appellant and his wife on September 1. The Ninth Circuit affirmed on appeal.

In 1978, appellant made a FOIA request to the Civil Aeronautics Board and was sent a copy of a June 1973 letter from TWA to the CAB in which TWA said appellant was suspected of selling as franchises what he was representing as branch offices. This charge, if true, would be grounds for disapproval of the "branch offices" by ATC and IATA. In a follow-up FOIA request in 1979, appellant obtained an August 1972 letter from TWA to ATA containing the same allegation. According to appellant, he had never known that TWA was spreading this particular charge against him, because TWA had assured him in a May 1973 letter that the only adverse information it had

heard about his business concerned allegations of illegal ticket sales and unqualified branch managers.

Appellant began the instant lawsuit in February 1980. His amended complaint ["the 1980 complaint"] named TWA and ninety Does as defendants, alleged diversity jurisdiction, and pleaded a single cause of action. It alleged that the defendants conspired to prevent appellant from opening his planned Ward branch offices, and did so by "secretively submitting to ATC and IATA false statements that the branch offices of plaintiff's United Travel Service were being sold as franchises and were under a different ownership than the parent offices."

The 1980 complaint was dismissed by Judge Schwarzer in April 1980 on the ground that it was barred by res judicata. It is from this judgment that

appellant appeals. Appellate jurisdiction is based on 28 U.S.C. Section 1291.

DISCUSSION

Appellant has mistakenly contended that res judicata applies only to "questions essential to and actually litigated in the first action." Actually, the doctrine of res judicata [or claim preclusion] "bar[a] all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties . . . on the same cause of action." Ross v. IBEW, 634 F.2d 453, 457 (9th Cir. 1980) (emphasis added). Hence, appellant's contention that the question involved in his present action was never actually litigated in the prior action is simply irrelevant.[2]

In the district court, appellant pointed to two differences between the

1975 suit and the instant suit which, he argued, made res judicata inapplicable. First, he has alleged new facts--that TWA falsely told ATC and IATA that appellant's branch offices were actually franchises. Second, he has changed his legal theory from interference with his relationship with his employees to interference with his relationship with ATC and IATA.

This court has held that a federal court sitting in diversity must apply the res judicata law of the state in which it sits. Gramm v. Lincoln, 247 F. 2d 250, 255 n.6 (9th Cir. 1958). We have applied that rule even where the prior action was in federal court and involved federal questions. See St. Paul Fire & Marine Ins. Co. v. Weiner, 606 F.2d 864, 868 (9th Cir. 1979)(collateral estoppel rules of forum state applied where prior judgments were federal criminal convictions). Hence California's law of res

judicata dictates what preclusive effect is to be accorded to the prior judgment against appellant. That California law, however, determines the res judicata effect of a prior federal court judgment by applying federal standards.[3] Therefore, those federal standards are applicable here to determine the preclusive effect of the prior judgment.

Under federal law, appellant does not avoid the bar of res judicata merely because he now alleges conduct by TWA not alleged in his prior suit,[4] nor because he has pleaded a new legal theory.[5] Rather, the crucial question is whether appellant has stated in the instant suit a cause of action different from those raised in his first suit.[6]

This circuit approaches that crucial question by applying several criteria to determine whether successive lawsuits involve a single cause of action:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980). The last of these criteria is the most important. Id.[7]

Both of appellant's lawsuits did "arise out of the same transactional nucleus of facts": TWA's alleged participation in efforts to ensure the collapse of appellant's license agreement with Montgomery Ward. Both lawsuits charge TWA with spreading falsehoods about appellant's business practices so as to ensure that ATC and IATA would disapprove the branch-office arrangement.[8] The only significant difference is that appellant claims to have unearthed one additional

falsehood communicated by TWA. The 1975 suit alleged that falsehoods concerning illegal ticket sales and unqualified branch managers were spread, whereas the instant suit charges false stories that appellant's branch offices were actually franchises. This evidentiary detail is scarcely enough to establish that the instant lawsuit arises out of a different "transactional nucleus of facts" than thatwhich generated the 1975 suit.

The other criteria for finding a single cause of action are also met. Clearly, TWA's freedom from liability for the loss of appellant's license agreement, established by the 1975 action, could be impaired by this instant action. The evidence in the instant action would apparently be virtually identical with evidence offered in the 1975 action, except for the 1972 TWA letter to ATA that appellant claims

revealed an additional rumor that TWA had spread. Finally, the two suits do involve infringement of the same right: the current suit seeks damages for violation of appellant's right to advantageous business relations with Montgomery Ward, just as the 1975 suit did.[9]

Thus the cause of action involved in the instant lawsuit is identical to one raised in appellant's 1975 suit, so that res judicata was properly invoked by the district court.

Appellant seeks to escape this conclusion by arguing that TWA fraudulently concealed the facts upon which his current cause of action is based. We need not decide whether there is a fraudulent concealment exception to the law of res judicata because no fraudulent concealment has been properly presented. Appellant bases his argument on a letter

TWA send him in May 1973, in reply to his inquiry as to what adverse information TWA possessed about his business. The letter referred to charges that appellant had used illegal tickets and unqualified branch managers, and then added that a TWAsales representative had "ma[d]e available to your personnel any information regarding your offices that was in our possession." Appellant insists that this constituted a fraudulent concealment of the fact that TWA had itself communicated an entirely different charge against appellant to ATA.[10]

Even assuming that the letter was a deliberate misrepresentation--which is far from clear--appellant has not made out a claim of fraudulent concealment because he has not pleaded with particularity facts establishing that he diligently attempted to uncover the information that he says was concealed.[11]

Appellant filed his first (1974) lawsuit nine months after receiving the supposedly deceptive letter, and alleged, inter alia, that TWA had conspired to cause ATC to disapprove his branch offices. Certainly he should have made discovery request for any communications about his business that TWA and ATC might have exchanged. Appellant's contention that he had "no rational basis for suspecting" that the May 1973 letter might not have given him all the adverse information TWA possessed about his business is simply not credible. Appellant had <u>every</u> reason, when he filed the original suit, to be suspicious of a party he was alleging had "communicated false and fraudulent information. . . resulting in baseless charges" against him. 1975 Complaint, Section 42(c).

Appellant insists that he did resort to discovery procedures in his 1975 suit and indeed made "ceaseless efforts to

discover the truth." 1980 Complaint, Section 34. But he gives no details of those efforts and never explains what discovery requests he mad in the 1975 lawsuit, nor why those requests failed to unearth TWA's August 1972 letter charging him with selling franchises. Hence he has not adequately alleged that he acted with reasonable diligence in trying to discover the allegedly concealed information.[12]

Thus, the district court properly concluded that the instant lawsuit is barred by res judicata. Appellant has not shown the existence of any "fraudulent concealment", even if such a showing would permit him to avoid the bar of res judicata.

AFFIRMED.

FOOTNOTES

1. Count II of the 1975 complaint alleged a conspiarcy to monopolize trade, pursuant to which defendants had agreed that plaintiff's proposed Ward branch offices would be disapproved. Count IV alleged unfair competition under California law, charging that defendants communicated false information about plaintiff's business that resulted in "baseless charges" against plaintiffs by the ATC. Count V alleged interference with business relations and incorporated the earlier factual allegations.

2. Appellant has apparently confused res judicata with the related but distinct doctrine of collateral estoppel, which does apply only when "an issue is actually and necessarily

determined." Montana v. United States, 440 U.S. 147, 153 (1979).

3. Younger v. Jensen, 26 Cal. 3d 397, 411, 161 Cal. Rptr. 905, 914 (1980); Levy v. Cohen, 19 Cal. 3d 165, 172-73, 137 Cal. Rptr. 162, 167 (1977): 4 B Witkin, California Procedure, Judgment, Section 156(b) (2d ed.1971)
4. Lester v. NBC,217 F.2d 399, 400 (9th Circ 1954), cert. denied, 348 U.S. 954 (1955) ("a judgment's finality applies to facts which might have been pleaded with reference to the same event as well as to those actually pleaded").
5. Scoggin v. Schrunk, 522 F.d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976) (res judicata bars "assertion of every legal theory that might have been raised" in first action).

6. Harris v. Jacobs, 621 F. 2d 341, 343 (9th Cir. 1980)("[r]es judicata preclusion extends only to claims that arise out of the same 'cause of actiom' asserted in the prior action").

7. No single criterion can decide every res judicata question: identity of causes of action "cannot be determined precisely by mechanistic application of a simple test." Abramson v. University of Hawaii, 594 F.2d 202, 206 (9th Cir. 1979).

8. See note 1 supra.

9. Paragraph 38 of the 1980 complaint seeks damages for the loss of the opportunity to open branch offices in Ward stores, just as Section 106 of the 1975 complaint had done. It is true that appellant sought those damages in his 1975 action under a Sherman Act monopolization theory,

whereas he now claims interference with ATC and IATA. But, as mentioned above, a mere change of legal theory does not imply a new cause of action.

10. See page 2 supra.

11. Such pleading is a requirement of federal law. Rutledge v. Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978).

12. Moreover, the cases in which fraud exception to res judicata was applied differ crucially from the instant case in that they involve situations where defendant's misconduct prevented plaintiff from knowing, at the time of the first suit, either that he had a certain claim or else the extent of his injury. See, e.g., Christian v. American Home Assurance Co., 577 P.2d 899 (Oakla. 1978) (plaintiff discovered cause of action for bad-faith refusal to

satisfy his claim only when breach-of-contract case went to jury); United States Rubber Co. v. Lucky Nine, Inc., 159 So 2d 874 (Fla. App. 1964)(defendant's deceitful testimony at the first trial concealed from plaintiff the true amount it was owed); Hyyti v. Smith, 272 N.W. 747 (N.D. 1937)(deception by an attorney connected with defendant's law firm kept plaintiff from learning that she could seek compensation for loss of support as well as out-of-pocket expenses in her wrongful death action). Here, however, appellant knew when he brought his original suit that he had a claim against TWA for attempting to block his license agreement with Montgomery Ward by having ATC and IATA disapprove it. That was the gist of Count Two of the 1975 complaint. Amd he knew what

injury TWA had allegedly inflicted on him: loss of the opportunity to open branch offices in the Ward stores. Thus even if defendant's May 1973 letter can be termed "fraudulent," it did not prevent appellant from realizing what cause of action he had against TWA nor what his damages were.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

A.V. COSTANTINI dba UNITED TRAVEL SERVICE dba WARD'S TRAVEL SERVICE, Plaintiff, v. TRANS WORLD AIRLINES, INC., DOES I THROUGH XC, Defendants.	C 80 0333 WWS ORDER GRANTING MOTION TO DISMISS AND JUDGMENT OF DISMISSAL

The motion of defendant Trans World Airlines, Inc. for an order dismissing the action for failure to state a claim on which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure came on regularly for hearing on April 11, 1980. Stephen C. Tausz, Esq. Bronson, Bronson & McKinnon appeared for defendant Trans World Airlines, Inc. A.V. Costantini, plaintiff, appeared in propria persona. The Court,

having taken judicial notice of the pleadings, records, and files in Civil Action Nos. C 74 0365 SAW and C 75 2221 WHO previously pending in this court, and good cause appearing therefor,

IT IS ORDERED that the motion of defendant Trans World Airlines, Inc. to dismiss for failure to state a claim on which relief can be granted is hereby granted on the ground that the action is barred under the doctrine of res judicata.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment be, and hereby is, entered in favor of defendant Trans World Airlines, Inc. and against plaintiff.

A.V. Costantini.

Dated April 16, 1980

WILLIAM W.SCHWARZER
JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT OF THE NORTHERN DISTRICT OF CALIFORNIA

LOCAL RULES-

-220-2 ...Each notice of motion shall be accompanied by affidavits or declarations under penalty of perjury....

-220-8 ...Factual contentions made in support of any motion shall be supported by affidavits or declarations....*

*Revised March 1, 1981: Rule 220-8 is now designated as 220-7

PROOF OF SERVICE

I, the undersigned, certify that I caused three copies of the foregoing PETITION FOR WRIT OF CERTIORARI, to be mailed this date, first-class postage prepaid, to all persons required to be served, who are as follows:

Stephen C. Tausz
Henry Lerner
Bronson, Bronson & McKinnon
555 California Street
San Francisco, Ca 94104

I declare under penalty of perjury that the above is true and correct.

Executed at Daly City, California on October 18, 1982

A.V. Costantini

Office - Supreme Court, U.S.
FILED
NOV 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-686

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

A. V. COSTANTINI,
dba UNITED TRAVEL SERVICE,
dba WARDS TRAVEL SERVICE,
Petitioner,

VS.

TRANS WORLD AIRLINES, INC., DOES I through XC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN C. TAUSZ
ELLIOT L. BIEN
BRONSON, BRONSON & MCKINNON
555 California Street
San Francisco, CA 94104
Telephone: (415) 391-4500
Attorneys for Respondent Trans World Airlines, Inc.

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

The only question presented is whether settled principles of *res judicata* were correctly applied by the Ninth Circuit Court of Appeals in affirming the District Court's dismissal of petitioner's diversity action against respondent* based on state common law.

---

*Pursuant to Supreme Court Rule 28.1, respondent Trans World Airlines, Inc. has the following parent companies, subsidiaries and affiliates: Transworld Corporation (parent); Canteen Corporation, Dunhill Personnel, Inc. Century 21 Real Estate, Hilton International Co., Spartan Food Systems, Inc. (affiliates).

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No. 82-686

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

A. V. COSTANTINI,
dba UNITED TRAVEL SERVICE,
dba WARDS TRAVEL SERVICE,
Petitioner,

vs.

TRANS WORLD AIRLINES, INC., DOES I through XC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

As set forth in the opinion of the Ninth Circuit (Appendix A to the Petition), reported at 681 F.2d 1199 (9th Cir., 1982), petitioner A. V. Costantini asserted a single claim for relief against respondent Trans World Airlines, Inc. ("TWA"). Founded on diversity jurisdiction (A-5), petitioner revived his previously asserted, and rejected complaint that in 1972 and 1973 TWA interfered

with petitioner's alleged license agreement to operate travel agencies in Montgomery Ward's branch stores (A-11). This repetitious litigation was dismissed on the obvious grounds of *res judicata*.

The petition here is simply a bare recitation of accusatory facts, which fails to address either the basis of the decision below or the standards for this Court's grant of certiorari to review that decision, pursuant to Supreme Court Rule 17.1. The petition just omits the critical issue determined adversely below—the fact that this dismissed complaint against TWA followed an earlier one, whose dismissal was also affirmed on appeal (A-4), which asserted the "identical" cause of action (A-11). Indeed, the whole basis of the dismissal, and its affirmance by the Ninth Circuit, was *res judicata*.

The Ninth Circuit concluded, as the District Court had, that petitioner was attempting to relitigate the exact same cause of action he had previously asserted against TWA and which went to a final judgment against him (A-4). Petitioner's earlier action was even broader in scope (A-3 to A-4), and asserted the same claim and theory of TWA interference with his Montgomery Ward business (A-9, *et seq.*). Thus, the petitioner's claim of newly discovered evidence, though inadequate in any event for his want of diligence (A-13), could hardly change the fact that the entire cause of action was itself barred by *res judicata*.

The instant petition, fairly construed, raises the sole question of whether petitioner's repetitive common law complaint was properly dismissed on *res judicata* grounds. That question, TWA submits, was correctly decided below and in any event does not justify review by this Court.

SUMMARY OF ARGUMENT

TWA has been in litigation with petitioner since February 1974 (A-3). His complaints have now twice been dismissed, and the dismissals have now twice been affirmed by the Ninth Circuit (A-4). There is no basis whatsoever for review in this Court. None of the grounds set forth in Supreme Court Rule 17.1 is even suggested, let alone established. At best, the petition involves a state law issue governed by settled principles of *res judicata*.

ARGUMENT

THE PETITION SUGGESTS NO CONFLICT AMONG FEDERAL CIRCUITS OR WITH A STATE COURT OF LAST RESORT, NO IMPORTANT OR UNSETTLED QUESTION OF FEDERAL (OR STATE) LAW, NOR ANY OTHER REASON FOR GRANTING CERTIORARI EXCEPT AN ALLEGED ERROR IN DECIDING A STATE LAW CLAIM UNDER THE DOCTRINE OF RES JUDICATA

Petitioner cites no "special and important reasons"—and there are none—for an exercise of this Court's discretionary review. Sup. Ct. Rule 17.1. There is no suggestion of any conflict with other circuits or California's court of last resort; or of any departure from accepted procedure; or of any important or unsettled question of federal law. Quite to the contrary, petitioner's whole argument is that the Ninth Circuit simply failed to follow petitioner's view of the law.

The Ninth Circuit's reasoning completely and correctly disposed of petitioner's argument to the merits, yet his petition fails even to address that reasoning. It only rehashes his previously litigated substantive claim, baldly

asserting that he *was* diligent enough to relitigate his claim based on so-called newly discovered evidence. Yet that attempt to save the claim was also completely disposed of by the court below.

Finally, petitioner has asserted a spurious procedural issue which the Ninth Circuit did not even choose to mention and which cannot merit this Court's attention. Though a local District Court rule he cites requires any factual contentions on a motion to be supported by affidavits or declarations (Petition at 17), the District Court's order (Appendix B to Petition) shows that judicial notice of the prior action fully fulfilled the requirements of the rule.

CONCLUSION

This Court's numerous denials of certiorari in recent months have involved federal, Constitutional and other issues far more deserving of attention than that presented here. Petitioner's protracted litigation against TWA warrants no extention by review in this Court. For all the foregoing reasons, the instant petition should be denied.

Dated: November 19, 1982

Respectfully submitted,

BRONSON, BRONSON & MCKINNON

By ELLIOT L. BIEN
Attorneys for Respondent
Trans World Airlines, Inc.

CERTIFICATE OF SERVICE BY MAIL

I, Elliot L. Bien, declare under penalty of perjury that the following facts are true and correct:

I am a members of the bar of the United States Supreme Court, and am associated with the firm of BRONSON, BRONSON & McKINNON, Bank of America Center, 555 California Street, San Francisco, California 94104.

To the best of my knowledge the following document:

BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

was served and filed in the following manner:

True copies of said document were enclosed in an envelope, addressed as follows:

Clerk of the Supreme Court of the United States 1 First Street N.E. Washington, D.C. 20543	A. V. Costantini 565 John Daly Blvd. Daly City, CA 94105
(40 copies)	(3 copies)

Said envelopes were sealed and deposited so sealed and addressed on November 19, 1982, with the said documents enclosed therein and with the postage thereon fully prepaid, in the United States Post Office, in the City and County of San Francisco, State of California.

Executed on November 19, 1982, San Francisco, California.

ELLIOT L. BIEN